U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 June 2003

CASE NUMBER: 2001-LHC-2011

OWCP NO.: 07-153769

IN THE MATTER OF

MARVIN G. FOUNTAIN,
Claimant

v.

HAM MARINE, INC.,
Employer

and

EAGLE PACIFIC INSURANCE CO.,
Carrier

APPEARANCES:

Henry Zuber, II, Esq.
On behalf of Claimant

Michael J. McElhaney, Jr., Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Marvin G. Fountain (Claimant) against Ham Marine, Inc., (Employer), and Eagle Pacific Insurance Co. (Carrier). The issues raised by the parties could not be

resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on January 31, 2003, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified, presented witnesses, and introduced thirty six exhibits, which were admitted, including: various Department of Labor forms; a memorandum of the informal conference; Claimant's discovery responses; Claimant's personnel record with Employer; accident and witness statements; various medical bills; Claimant's deposition; medical records and the deposition of Dr. Steven Beam; medical records from Drs. D.J. Herrington, John J. McCloskey, David L. McKellar, Y. Susie Folse, Derrick Duffield, Bertha Blanchard, and David Lee; medical records from Wesley Medical Center, Forrest General Hospital, and The Spine Center; a psychological and psychometric evaluation; vocational rehabilitation records, wage records from Kent Hillman Logging; and Claimant's 1998 tax return.[1]

Employer introduced thirty-nine exhibits, which were admitted, including: various Department of Labor forms; Employer's personnel records for Claimant; Employer's and Claimant's discovery responses; Claimant's Social Security Earnings Report; vocational rehabilitation records and labor market surveys; the medical records and deposition of Drs. Steven Beam and Kerry Bernardo; medical records of Drs. David Kellar, Kerry Bernardo, John McCloskey, Susie Folse, Derrick Duffield and Charles Lee; medical records from Wesley Medical Center, Forrest General Hospital, Singing River Hospital; a V.R. psychological and psychometric evaluation of Claimant; Employer's accident and safety reports; Claimant's personnel and wage reports from previous employers; a memorandum of the informal conference; Claimant's LS-200 Report of Earnings; and Claimant's deposition.

Post-hearing, Employer submitted the deposition of Dr. Lee, which is admitted. Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. An employer-employee relationship existed at the time of the accident;

2. A Notice of Controversion was filed on September 3, 1999;

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[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX __, p.__; Employer's exhibits- EX __, p.__; Administrative Law Judge exhibits- ALJX __, p.___.

3. An informal conference was held on December 28, 2000; and

4. Claimant's average weekly wage at the time of the alleged accident was $784.12.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Whether Claimant's alleged injury arose out of an in the course and scope of his employment with Employer;

2. Extent and degree of disability;

3. Permanent total disability;

4. Loss of wage earning capacity;

5. Whether or not Claimant's termination from employment with Friedie Goldman will allow Employer not to pay any additional indemnity benefits following the date of Claimant's termination;

6. Payment of medical expenses;

7. Apportionment;

8. Section 8(f) relief; and

9. Interest and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant was born in 1964, and at all pertinent times, he lived in Richton, Mississippi. (CX 35, p. 3). Academically, Claimant had to repeat the First, Third, and Seventh Grade levels, and functional assessment testing performed in August, 2000, revealed that Claimant functioned on a First grade level in reading and spelling, and a Fifth grade level in arithmetic. (CX 23, p. 2; CX 35, p. 4). Claimant has the social maturity of a seventeen year old, and the ability to communicate of a ten year old. (CX 23, p. 2). Based on Claimant's scores, he was retarded and functionally illiterate. (CX 23,

p. 3; CX 35, p. 4). On June 15, 1998, Claimant began working for Employer in Pascagoula, Mississippi, nearly eighty-three miles from his home in Richton, as a structural fitter. (CX 9, p. 1). Claimant's starting pay was $13.00 per hour, but by September 14, 1998, he had earned merit increases to $15.00 per hour. (EX 7, p. 13).

In April, 1999, Claimant stopped working because of an onset of low back pain. (CX 11, p. 1). On April 29, 1999, Claimant began treatment with Dr. Bernardo, and after Claimant improved with physical therapy, Dr. Bernardo released Claimant to return to work without restrictions on May 24, 1999. (CX 17, p. 2, 8). When Claimant attempted to return to his former job, he experienced pain, and after his new foreman told him that he was not needed if he could not perform his job, Claimant quit. (Tr. 53). In July, 1999, Claimant obtained a job driving a truck, but Claimant continued to experience back spasms. (Tr. 56). Without seeking the approval of Employer, Claimant began treatment with Dr. McCloskey for his low back in January, 2000, and Dr. McCloskey referred Claimant to a pain management specialist, Dr. McKellar. (CX 21, p. 1; CX 22, p. 2). Pursuant to the advice of Dr. McKellar, Claimant quit driving trucks by July 6, 2000, and he experienced a significant reduction in his level of pain. (CX 22, p. 33).

Again without seeking the approval of Employer, Claimant began treatment for his low back problems with Dr. Flose in October, 2000. (CX 24, p. 4). Dr. Folse ordered a functional capacity evaluation, which stated that Claimant could perform work only at a light level of exertion, and she assessed that Claimant had reached maximum medical improvement on December 11, 2000. (CX 24, p. 9). No physician of record opined that Claimant had a surgical problem with is discs, rather, Claimant's problems stemmed from the muscles in his lower back. (CX 17, p. 3; CX 21, p. 12; CX 22, p. 6; CX 24, p. 11; CX 37, p. 2-3; EX 36, p. 42-43).

B. Claimant's Testimony

Claimant testified that he was born in October, 1964, he completed the Seventh grade in school, and he possessed a commercial drivers license. (Tr. 46, 79). Claimant was hired as an iron worker by Employer, a job that entailed hanging iron on rigging, welding, cutting, and a lot of lifting, straining, and toting. (Tr. 46). Regarding his workplace injury on April 19, 1999, Claimant testified:

> We was hanging eight-inch channel iron in engine room D, on Bingo 9000, and we were doing a lot of lifting and toting iron in there, we couldn't get no rigging in there to it cause the decks done been set on the rig. And I just come down with some pain in back and started having trouble.

(Tr. 48).

Claimant testified that his injury occurred on a Thursday, he completed work that day, and woke up the next morning in pain. (Tr. 48). Claimant had pre-approved leave that morning, and he took the following day off. (Tr. 48). When Claimant's back pain was not any better on Sunday, he

went the emergency room where he noticed some swelling in his lower back. (Tr. 48). After receiving a shot for his back pain, Claimant returned to the hospital the next day, and hospital staff set up an appointment with Dr. Bernardo. (Tr. 51).

After undergoing five weeks of physical therapy, Claimant returned to work with a light duty slip, which he gave to David Seaman, but the general foreman stated that Claimant's injury was not work related and he could not return to work until he was fully released by his physician. (Tr. 52). After having a talk with Dr. Bernardo, Claimant obtained a release to return to work at full duty. (Tr. 53). When Claimant returned to work he experienced back pain, he made an attempt to obtain light duty again, but a new foreman told him that if he could not do his job, he was not needed. (Tr. 53). Claimant left work early, and obtained a new job at Kent Hillman Logging as a truck driver. (Tr. 54). After nine months at Kent Hillman Logging, work tapered off and Claimant found a job driving a dump truck. (Tr. 55). After Dr. McKellar informed him that truck driving would continually aggravate and swell his back, Claimant quit driving trucks. (Tr. 56, 58). Indeed, throughout his truck driving employment, Claimant testified that he had regular muscle spasms. (Tr. 56). While he did not receive an injury, Claimant explained that the activity just aggravated his pre-existing condition. (Tr. 68).

The day before the formal hearing, Claimant received his first Botox injection from Dr. Stagg, and he testified that it had yet not helped any. (Tr. 62). Botox injections took fourteen to twenty days to have any affect. (Tr. 82). Failing to obtain relief from Botox injections, Claimant understood that there was no other medical treatment that would help him. (Tr. 62).

C. Testimony of Ricky D. Parker

At the time of Claimant's workplace accident in April, 1999, Mr. Parker was employed as Employer's Corporate Director of Safety. (Tr. 45). Mr. Parker did not have any personal interaction with Claimant, but he was familiar with the policies and procedures of Employer, which were not always followed in every case. (Tr. 45-46). Mr. Parker explained that Claimant violated Employer's policy by waiting two weeks to report his injury, and waiting so long was a basis for termination. (Tr. 161).

Mr. Parker testified that Employer had a full light duty employment program in place to assist injured workers. (Tr. 162). Upon receiving a light duty slip, the medical department would first try to place the employee within his or her particular craft if a suitable position was available. (Tr. 162). If no position was available in the particular craft, Employer had other light duty alternatives. (Tr. 162). One such alternative was a position the tool room, which entailed handing out tools within an employee's weight limitations. (Tr. 164). Such work was done in the normal scope of Employer's business. (Tr. 165). Other positions included table top work assembling electrical kits for offshore work and guard duty. (Tr. 165-66). Light duty was generally limited to forty hours a week, but overtime could be approved on a case by case basis. (Tr. 167).

D. Exhibits

(1) Employer's Personnel Records

On June 8, 1998, Desi Collins requested that Claimant be hired as a structural fitter beginning on June 15, 1998. (CX 9, p. 1). Claimant had previous experience as a fitter working for Brown & Root, and had experience as a boiler maker. *Id*. at 2. Additionally, Claimant's relative, Mike Fountain, was working as a fitter for Employer. *Id*. On July 24, 1998, Claimant received a raise from $13.00 per hour to $14.25 per hour because Claimant demonstrated that he was a dependable worker and had "very good" safety and work habits. (CX 10, p. 1). On September 14, 1998, Claimant received a second merit pay increase to $15.00 per hour with an "excellent" evaluation and remarks that he worked well, needed little supervision, was dependable, and worked well with others. (EX 7, p. 13). Claimant's evaluator noted that Claimant's job performance, attendance, attitude, and safety habits were "excellent." *Id*. In another evaluation dated January 13, 1999, Claimant received a written warning for "loafing." *Id*. at 12. While his attendance and safety habits were rated as "excellent," his attitude was only "satisfactory," and his job performance was "poor." *Id.*

In an accident statement signed by Claimant on May 3, 1999, Claimant indicated that he injured himself lifting eight inch by fifteen to twenty feet irons on April 22, 1999. (CX 11, p. 1). Michael Fountain, Jr., signed a witness statement stating that Claimant was standing on a piece of channel iron when he fell, grabbed the channel iron, and hurt his back. *Id*. at 2. In a May 3, 1999 accident report, Claimant allegedly reported that there was no specific time or cause of his injury, but he had been carrying heavy material and he experienced a gradual onset of pain. *Id*. at 3. In a safety investigation report, Employer noted that Claimant's injury occurred through repetitive over-exertion while lifting, and noted that Claimant did not report the accident for two weeks. (EX 7, p. 21-22). Claimant had not returned to work since April 22, 1999, but had made several trips to deliver doctor excuses. (CX 11, p. 3). On June 9, 1999, Claimant job was "re-evaluated" due to personal medical problems, he was eligible for rehire, and Claimant received a poor rating for job attendance. (EX 7, p. 11). In job performance, attitude and safety habits, Claimant received a "satisfactory" evaluation. *Id*.

(2) Medical Records from Singing River Hospital

On June 30, 1995, Dr. Bucci treated Claimant in the hospital emergency room for severe blunt chest trauma with multiple fractured ribs and a pneumothorax. (EX 27, p. 1). Initial films of Claimant's cervical spine and pelvis were normal. *Id*. In a discharge note authored by David Spencer, Claimant was reported to have multiple fractured ribs, a liver hematoma, pneumothorax, and Claimant was observed in the intensive care unit for about eight days. *Id*. at 2. After seventeen days in the hospital, Claimant was discharged on July 16, 1995, with a final diagnosis of: motor vehicle accident with fracture of ribs on the right; hemopneumothorax; hematoma of the liver; subcutaneous emphysema, multiple abrasions; and a puncture wound to the elbow. *Id*.

(3) Medical Records from Wesley Medical Center and Forrest General Hospital

On April 19, 1999, Claimant presented to Wesley Medical Center complaining of lower back pain. (CX 16, p. 1). Medical notations indicated that the pain was due to an old motor vehicle accident. *Id*. X-rays did not reveal any abnormalities. *Id*. at 3. Claimant returned to the hospital on April 22, 1999, complaining that his lower back pain was not any better. *Id*. at 5. Claimant received pain medication, and Dr. McKellar recommended that Claimant not return to work until an MRI could be obtained. *Id*. at 6. Dr. McKellar also referred Claimant to Dr. Bernardo. (EX 18, p. 66).

On April 23, 1999, Claimant underwent a lumbar MRI which demonstrated: degenerative changes at L6-S1 with a small disc protrusion that was not significantly impinging on the thecal sac or encroaching on the neural foramina. *Id*. at 10.

On October 1, 2000, Claimant presented to Forrest General Hospital complaining of low back pain. (CX 16, p. 12). Claimant received medication and was referred to a neurosurgeon, Dr. Lee. *Id*. at 14.

On November 7, 2001, Claimant underwent two views of his lumbar spine, which revealed an essentially negative lumbar study, and an MRI revealed degenerative disc disease at L6-S1 with a mild disc protrusion, which was essentially unchanged as compared to his April, 1999, study. (EX 18, p. 6-7).

(4) Medical Records and Deposition of Dr. Kerry Bernardo

On April 29, 1999, Dr. Bernardo examined Claimant on the referral from Dr. Patterson, an emergency room physician. (CX 17, p. 2). Claimant related that he was in his usual state of health until one week ago when he awoke with back pain. *Id*. A short time later, his back pain settled down, but when he bent over to pick up an object at work, his pain returned. *Id*. Claimant denied having any history of back pain. *Id*. Dr. Bernardo assessed a severe lumbar sprain/strain, and he opined that Claimant did not have any neurosurgical operative problems. *Id*. at 3. Dr. Bernardo prescribed three weeks of physical therapy, and kept Claimant off from work until May 19, 1999. *Id*. at 3-4.

On May 19, 1999, Dr. Bernardo reported that Claimant had improved dramatically with physical therapy, and Claimant was no longer experiencing discomfort in his lower back. (CX 17, p. 8). Claimant continued to exhibit paraspinous muscle spasm, and because Claimant was anxious to return to work, Dr. Bernardo released Claimant to begin work on Monday, May 24, 1999, as Claimant requested, without any work restrictions. *Id*.

On October 18, 1999, Claimant appeared for a follow-up appointment after experiencing some lower back pain in late September. (CX 17, p. 9). A physical exam revealed that Claimant no longer had back spasms, and Dr. Bernardo explained that Claimant was merely experiencing problems secondary to his lumbar sprain/strain. *Id*. Dr. Bernardo stressed the importance of performing his home exercises, but he did not think Claimant's problems were significant enough to warrant a prescription for physical therapy. *Id*.

In his deposition, Dr. Bernardo explained that his releasing of Claimant to return to work without restrictions on May 24, 1999, was based on his medical opinion, and if he believed Claimant needed some work restrictions he would have issued them. (EX 34, p. 16-17). Likewise, after Claimant's October 18, 1999 office visit, Dr. Bernardo did not place any restrictions on Claimant. *Id*. at 19. After reviewing a recent MRI scan of Claimant's lumbar spine, Dr. Bernardo opined that Claimant never had a nerve problem, the MRI was unchanged form earlier studies, and Claimant had no need for a discogram. *Id*. at 20-21.

(5) Medical Records of Dr. John J. McCloskey

On January 4, 2000, Dr. McCloskey, a neurosurgeon, evaluated Claimant for severe low back and legs pains. (CX 21, p. 1). Claimant denied a history of back problems prior to his workplace accident, which he reported was on April 12, 1999. *Id*. at 11. After conducting a physical exam and reviewing Claimant's MRIs, Dr. McCloskey opined that Claimant had symptomatic degenerative spondylosis with a small disc herniation at L5. *Id*. at 12. Dr. McCloskey did not think Claimant had a problem that should be corrected by surgery, but he related Claimant's symptoms to Claimant's workplace injury based on Claimant's history. *Id*. at 12. After taking a set of x-rays, Dr. McCloskey reported on January 9, 2000 that they were normal, but he still believed that Claimant had spondylosis. *Id*. at 18. After having Claimant's x-rays reviewed by a respected radiologist, however, Dr. McCloskey indicated on January 12, 2000, that Claimant did not have spondylosis. *Id*. at 20. In response to a letter from Claimant's attorney, Dr. McCloskey did not think that it was appropriate for him to make a statement about Claimant's diagnosis, date of maximum medical improvement, or physical restrictions. (EX 16, p. 16).

(6) Medical Records of Dr. David McKellar

On March 31, 2000, McCloskey referred Claimant to Dr. McKellar, a pain management specialist, for an evaluation of Claimant regarding degenerative spondylosis. (CX 22, p. 2). Claimant related to Dr. McKellar on April 24, 2000, that his pain was a six on a zero to ten scale, and picking up anything aggravated his symptoms. *Id*. at 5. Claimant revealed that he was in an automobile accident in 1995, which cause a fractured rib and a punctured lung. *Id*. at 6. After conducting an examination of Claimant, Dr. McKellar assessed lumbar spondylosis and lumbar sprain/strain. *Id*. Dr. McKellar recommended epidural steroid injections to see if it relieved any of Claimant's pain, and Claimant underwent his first injection on April 24, 2000. *Id*. at 7.

On May 12, 2000, Claimant reported that the epidural steroid injection provided some benefit, and Dr. McKellar scheduled a repeat injection at L4-5. (CX 22, p. 23). On June 9, 2000, Claimant received an epidural steroid injection at L-5. (EX 14, p. 4). On June 21, 2000, Dr. McKellar held Claimant from returning to work for a two week period to determined if his truck driving was the cause of his back pain after epidural steroid injections failed to provide any significant relief. *Id*. at 3. On July 6, 2000, Dr. McCloskey remarked that Claimant had three epidural steroid injections without any significant benefit. (CX 22, p. 33). Claimant related that he was no longer driving a truck ten to twelve hours a day, his pain had decreased to a level of three on a ten point scale, and Claimant reported that he did not have to take any pain medication while he was not working. *Id*. Dr. McKellar's diagnosis remained lumbar spondylosis, and he recommended that Claimant find another line of work in the light to moderate category where he could change positions frequently. *Id*.

(7) Medical Records of Dr. Y. Susi Folse

On October 9, 2000, Dr. Folse evaluated Claimant due to his complaints of low back pain after Claimant had went to Forest General Hospital complaining of new shocking type pain extending down his right leg. (CX 24, p. 4). Dr. Folse assessed chronic low back pain with a recent change to radicular type symptoms, and she prescribed physical therapy. *Id*. at 5.

On November 6, 2000, Claimant reported that physical therapy improved his symptoms but he continued to experience some paraspinal tightness in his right lower side. (CX 24, p. 7). Dr. Folse's new assessment was chronic low pack pain with right paraspinal tightness. *Id*. She administered an injection and referred Claimant back to physical therapy. *Id*. On November 27, 2000, Claimant continued to complain of pain and Dr. Folse ordered a repeat MRI. *Id*. at 8. On December 11, 2000, Dr. Folse reviewed Claimant's December 5, 2000 MRI, and opined that Claimant had degenerative disc desiccatory changes at L6-S1 with a small disc protrusion that did not impinge on the thecal sac. *Id*. at 9. Dr. Folse opined that Claimant had reached maximum medical improvement and she recommended a functional capacity evaluation to determine his work status. *Id*.

On March 22, 2001, Dr. Folse assessed some mild degenerative disc disease and advised Claimant to follow up with vocational rehabilitation. (CX 24, p. 10). On July 31, 2001, Claimant continued to complain of significant right paraspinal muscle tightness, and Dr. Folse assessed low back pain with right muscle paraspinal spasms of an unknown etiology. *Id*. at 11. Dr. Folse recommended an EMG nerve conduction study of his right lower extremity. *Id*. Dr. Folse also reported that Claimant was unable to have gainful employment because he could not perform manual labor, and he was mildly mentally retarded with deficits in reading and writing. *Id*. Meanwhile, Dr. Folse prescribed six weeks of aggressive physical therapy for lumbar stabilization in an attempt to end Claimant's muscle spasms. *Id*.

On October 4, 2001, Dr. Folse noted that Claimant had an EMG which demonstrated some positive EDB, but Claimant's paraspinal muscle could not be tested secondary to a fungal rash in that

area. (CX 24, p. 3). Dr. Folse assessed myofascial low back pain of an unknown etiology and radicular like symptoms. *Id*. Dr. Folse opined Claimant's positive EDB could be due to Claimant's shoe wear, and she recommended another test so Claimant's right paraspinal muscle could be evaluated. *Id*. On October 23, 2001, Dr. Folse reported that the subsequent EMG was negative, and the earlier positive reading was most likely due to shoe trauma. *Id*. at 6. Dr. Folse recommended that Claimant return to work with the restriction that he not engage in lifting over fifteen pounds, and not engage in any repetitive bending or stooping. *Id*.

(8) December 27, 2000 Functional Capacity Evaluation

Claimant's performance in his functional capacity evaluation led his evaluators to opine that Claimant could perform work in the light category of exertion for an eight hour work day. (CX 26, p. 1). Claimant fully participated in the all but one task, in which he exhibited self-limited participation by stopping due to pulling in the right side of his back and right leg pain. *Id*. Claimant could occasionally lift fifteen pounds, work above his head, work sitting, work stooping, and engage in repetitive squats. *Id*. at 2. Claimant could frequently sit, stand, kneel, work squatting, climb stairs, walk, crawl, climb ladders, and rotate his trunk. *Id*.

(9) Medical Records of Dr. Derrick Duffield

Dr. Duffield began treating Claimant on May 9, 2001, in regarding Claimant's complaints of low back pain. (CX 27, p. 1). On June 28, 2001, Dr. Duffield noted that Claimant's back pain had improved with the use of a back brace. *Id*. at 2. Dr. Duffield treated Claimant with Ibuprofen, Skelaxin, and physical therapy, but he opined that Claimant could continue to have problems with back pain and he recommended vocational rehabilitation considering the fact that Claimant could not continue to drive a truck or perform construction work. *Id*. at 3.

(10) Radiology Reports

A December 5, 2000 MRI of Claimant's lumbar spine revealed: degenerative disc desiccation changes at L6-S1 along with a small central protrusion of the disc with no impingement on the thecal sac. (CX 18, p. 2). An MRI of the lumbar spine taken on November 7, 2001 demonstrated: a mild disc protrusion at L6-S1 and an even milder disc protrusion at L5-6. *Id*. at 3. There was still no significant impingement on the exiting nerve root or compromise of the thecal sac. *Id*. In all, the MRI was essentially unchanged from the prior study of April, 1999. *Id*. On May 8, 2002, Claimant had another MRI which revealed L6-S1 spondylosis, grade 1; a minor L6-S1 disc herniation slightly indenting the thecal sac; and the radiologist opined that the MRI was unchanged from the study done on November 7, 2001. *Id*. at 5.

(11) Medical Records and Deposition of Dr. Steven Beam

On February 6, 2001, Dr. Beam, an expert in the field of occupational medicine, evaluated Claimant on the referral of Dr. Folse. (CX 25, p. 3). Claimant described his pain as nagging, aching, and constant. *Id*. Claimant took Tylenol and an over-the-counter Percogesic to control his pain, but he related that his pain level varied, and a couple of times a week his back muscles would "flatten out," nearly incapacitating him from walking and from any type of work. *Id*. Dr. Beam's assessment of Claimant's condition was chronic low back pain and degenerative disc disease at L6-S1 as demonstrated in his MRI. *Id*. at 4. Reviewing Claimant's functional capacity evaluation, Dr. Beam concurred that Claimant was capable to working light duty, and Dr. Beam assigned Claimant a five percent permanent impairment rating to the body as a whole. *Id*. Dr. Beam also concurred with Dr. Folse's treatments, and he related that Claimant had more than adequate treatment. *Id*.

On October 1, 2001, Dr. Beam completed a work restriction evaluation in which he recommended that Claimant could engage in intermittent sitting, walking, lifting, squatting, and climbing, but Claimant should not engage in any bending, kneeling or twisting. (CX 25, p. 1). Claimant could stand as long as four hours a day, he could occasionally reach above his shoulders, and he was capable of working an eight hour day. *Id*. Claimant was not capable of using his feet to operate foot controls for repetitive movement. (CX 15, p. 9). In Dr. Beam's opinion, Claimant had reached maximum medical improvement on February 6, 2001. (CX 25, p. 1).

Regarding the causation of Claimant's abnormal discs, Dr. Beam stated:

> Well, the degenerative disk changes can happen over time. Those can happen with people who with their particular job put a lot of stress on their back. The herniated disk probably was related to the work that he was doing. As I understand it, there's a lot of bending, stooping, lifting. It's also true that over the course of time that due to disk problems themselves can come from heavy use of the back. So it would be my opinion that as physical laborer, or as I understand his job to be, over the course of his work of heavy lifting, bending, and stooping he injured his back.

(CX 15, p. 8).

Dr. Beam also explained that driving trucks for approximately one year after being released by Dr. Bernardo could aggravate or exacerbate Claimant's back problem. (EX 36, p. 29-30). There was noway to tell what percentage Claimant's back problems were due to his work with Employer and what percentage was due to an aggravation by driving trucks. *Id*. at 36-37. If Claimant had hurt himself again while driving a truck, that could be a new injury not attributable to his earlier workplace injury with Employer. *Id*. at 37. Dr. Beam stated that he never received any history from Claimant that he suffered a new injury while driving tricks. *Id*. at 38.

Dr. Beam further opined that Claimant had reached maximum medical improvement on December 11, 2000, as indicated by Dr. Folse, because Claimant had no changes in his complaints

by the time of his February 6, 2001 evaluation. (CX 15, p. 8). The work restrictions he issued for Claimant on October 1, 2001 were permanent, inasmuch as Claimant suffered permanent damage to the muscles in his back *Id*. at 9; (EX 36, p. 42-43). Once a muscle spasms stopped, it could start again with work activities, by sitting or standing too long, or by putting the body in a position that caused muscle tension. *Id*. at 44.

In explaining why Claimant should not operate repetitive foot controls, Dr. Beam stated that Claimant could use his feet for control but he did not feel comfortable in stating that Claimant could repetitively operate a clutch due to the fact that Claimant has back pain and spasm. (EX 36, p. 9-10). Claimant was at an increased risk of danger in operating anything with foot pedals, which included his personal automobile. Claimant could drive if a job was considered light work, but the more twisting, turning, and sitting involved in driving the more problems Claimant was likely to have with his back. *Id*. at 17. Under reasonable conditions, Claimant could operate a car or a pick up truck, but operating heavy equipment, such as dump trucks or other heavy machinery, that requires a lot of clutching and which bounce the vehicle occupant around was not a good idea. *Id*. at 26-27.

(12) Medical Records and Deposition of Dr. David Lee

On August 19, 2002, Dr. Lee, a neurologist, evaluated Claimant on a referral from Dr. Folse. (CX 37, p. 1). Dr. Lee noted some paraspinous spasms on Claimant's right side, and Dr. Lee's impression was that Claimant had mechanical back pain syndrome and paraspinous myofascial pain on the right side. *Id*. at 2-3. Dr. Lee recommended Botox injections and a back brace. *Id*. at 3. Additionally, Dr. Lee recommended flexion/extension x-rays to make sure Claimant's listhesis did not change, and he recommended a discogram to determine if there was any concordance of pain. *Id*. at 3.

On September 30, 2002, Dr. Lee noted that Claimant had excellent pain relief from using an LSO brace, but Claimant continued to complain of paraspinous muscle pain, which was also present in Claimant's physical exam. (CX 37, p. 4). The results of Claimant's discogram were "fairly normal." *Id*. Also, three views of Claimant's lumbar spine on September 13, 2002, following his discogram were normal, and a CT of his lumbar spine was normal. *Id*. at 5-6. Dr. Lee reiterated his impression of myofascial pain syndrome and he recommended Botox injections and a referral to Dr. Lynn Staggs. *Id*. at 4.

On October 3, 2002, Dr. Staggs concurred that Botox injections were appropriate. (CX 37, p. 8). Claimant also requested that Dr. Staggs release Claimant to return to work as a heavy equipment "motor grader." *Id*. Reviewing Claimant's functional capacity evaluation, Dr. Staggs did not recommend that Claimant undertake that job, and she wanted to review the outcome of the Botox injections and undertake another functional capacity evaluation to reevaluate his work capacity. *Id*. On November 19, 2002, Dr. Staggs continued Claimant on the same restrictions as set out in his earlier functional capacity evaluation. (EX 37, p. 2). On December 8, 2002, Dr. Lee wrote to Claimant's attorney that he could not determine a permanent impairment rating for Claimant until

after he underwent a trial of Botox injections, and Claimant was not at maximum medical improvement until such time as Dr. Staggs recommendation for Botox injections had been carried out. (CX 37, p. 9). Given Claimant's history of tearing a muscle at work, Dr. Lee could only assume that Claimant's myofascial pain was related to that injury. *Id*.

In his deposition, Dr. Lee testified that Claimant's spinal defect at L6-S1 was a congenital, and Claimant's MRI did not reveal any acute herniations. (EX 40, p. 11). Based on his review of the medical records, and based on the relief Claimant experienced with Botox injections, Dr. Lee stated that Claimant did not need a myelogram because it was Claimant's muscles, more than his discs, that were causing his problems. *Id*. at 12. After being presented with selections of Dr. Bernardo's records, Dr. Lee stated that Claimant seemed to have reached maximum medical improvement on May 24, 1999. *Id*. at 22. Regarding the causation of Claimant's current back problems, Dr. Lee stated:

> I would say that based upon his initial injury and his being released to full duty in May of 1999, back to full duty, per Dr. Bernardo's notes, and then the fact that he presented back in January of 2000 with exacerbations and problems and he was logging or driving a truck at least at that time, that it was probably an aggravation of a pre-existing injury he'd sustained, from looking back at the notes, it would probably be 50 percent of the pain would be due to his initial injury and the rest would be due to his exacerbation probably secondary to something related to the work he was performing at the time.

(EX 40, p. 25).

(13) V.R. Psychological and Psychometric Evaluation

On August 15, 2000, Tina Moody interviewed Claimant and reported that he dropped out of school in the Seventh grade, and his work history consisted of truck driving, construction, and outrigging. (CX 23, p. 1). In the Wide Range Achievement tests, Claimant demonstrated an ability to function at the First grade level in reading and spelling, and he was able to function at the Fifth grade level in arithmetic. *Id*. at 2. On the Vineland Social Maturity Scale, Claimant had a social age equivalency of a seventeen year old, with the ability to communicate at the ten year old level. *Id*. Thus, Claimant had a specific learning disability in reading and spelling, he was moderately retarded academically in reading and spelling, and mildly retarded in adaptive behavior functioning. *Id*. at 3.

(14) Vocational Rehabilitation Report of July 20, 2001

Pam Hall from the Mississippi Department of Rehabilitation Services reported on July 20, 2001, that Claimant was a client from July 25, 2000 to December 8, 2000, and upon a review of his

medical records it was felt that his vocational potential was questionable. (CX 28, p. 1). Claimant had agreed to enter a trial work plan, but shortly after it began Claimant went to the emergency room for back pain. *Id*. Subsequently, Claimant's vocational rehabilitation case was closed due to his inability to participate because of his ongoing medical treatment and physical therapy. *Id*.

(15) Vocational Rehabilitation Reports and Testimony of Leon Tingle and Ty Pennington

Mr. Tingle reported that Claimant was born on October 3, 1964, was raised in Wayne County Mississippi, lived in Richton, Mississippi, and had a wife and two children. (CX 35, p. 3). Claimant held a Class A drivers license and had access to dependable transportation. *Id*. Claimant had left school in the Eighth grade, and he had to repeat the First, Third, and Seventh grade levels. *Id*. at 4. In achievement tests, Claimant scored at the Second grade level in reading, the Fifth grade level in math, and the Third grade level in word recognition. *Id*. Based on his scores, Claimant was functionally illiterate. *Id*. Based on Claimant's work history, which included oil patch and construction type jobs, Mr. Tingle opined that Claimant had few transferable skills for obtaining light duty employment, and would have difficulty finding a job due to his functional illiteracy. *Id*. at 5. Mr. Tingle reasoned that Claimant was commuting the eighty-three miles from Richton, Mississippi to Pascagoula, Mississippi at the time of is accident, thus, Mr. Tingle utilized the Pascagoula, Mississippi, and Mobile, Alabama job markets for identifying alternative employment. *Id*. at 7. Using the limitations set forth in Claimant's December 27, 2000 functional capacity evaluation, Mr. Tingle identified the following jobs as suitable for Claimant's intellectual and medical conditions on July 5, 2000:

> Jackson County - Janitor. Located in Pascagoula, Mississippi, this position paid $7.05 per hour. The job entailed cleaning office buildings in the Jackson County area. The position required a medium level of exertion.
>
> Jackson County - Road Machine Operator. Located in Pascagoula, Mississippi, this position paid $9.76 per hour. The job entailed skilled work in the operation of various types of equipment to move material, mow grass, and handle general road maintenance. The applicant operated gasoline or machine powered equipment such as tractors, bulldozers, or front-end loaders. Prior experience was preferred, however, training was provided. The position required a light to medium level of exertion, and was a skilled or semi-skilled position.
>
> Jackson County - Animal Caretakers/Animal Control Officers. Located in Pascagoula, Mississippi, these jobs paid $9.76 per hour for the Animal Control Officer, and $7.05 per hour for the Animal Caretaker. The Animal Control Officer assisted the Animal Shelter Director in enforcing the Jackson County Leash Ordinance. The individual must be 21 years of age, have a valid Mississippi Drivers License as well as knowledge of the leash law and proper procedures for caring for different animals. Claimant did not have any knowledge of the leash

law. The Animal Caretaker job required maintaining the kennels and related areas at the Animal Shelter. This position also required knowledge in handling different breeds of animals.

Papa John's Pizza - Delivery Driver. Located in Pascagoula, Mississippi, this job paid an average of $300.00 per week. The position was light in nature and required an interested applicant to have a good working knowledge of the Pascagoula area along with a clean driving record and proof of insurance.

Superior Building Supply - Boom Truck Driver. Located in Pascagoula, Mississippi, this job paid $8.00 per hour. The job entailed operating a boom truck that delivered materials such as shingles and sheet rock to work sites for individuals. The job required a light to medium level of work, but it did not require a high school diploma.

Nordan Contracting - Lowboy & Dump Truck Driver. Located in Pascagoula. Mississippi, this job paid $8.00 to $10.00 per hour based on experience. Some experience was preferred along with a commercial drivers license. The work was categorized as requiring a light to medium level of exertion.

Finch Logistics - Shuttle Bus/Jockey Driver. Located in Mobile, Alabama, this position paid $9.00 per hour. The position was light in nature and required a high school diploma or GED and clean driving record.

Van Elmore Services - Sweeper Driver. Located in Mobile, Alabama, this position paid $6.50 per hour. The position was light in nature and required the applicant to operate a sweeper machine to clean parking lots and other assigned contract areas. Training was provided and the job entailed frequent reaching and handling. A high school diploma was not required.

Dump Truck Driver - Located in Laurel, Mississippi, this job paid $8.00 per hour. The position entailed driving a dump truck and Lo-Boy to haul dirt and equipment in the State of Mississippi. This job required a medium level of exertion.

Bus Driver - Located in Hattiesburg, Mississippi, this job paid $6.33 per hour. The position entailed transporting children to and from assigned centers, and maintaining assigned bus reports and records.

Forklift Operator - Located in New Augusta, Mississippi, this job paid $10.00 per hour. The position entailed operating a forklift to move bails of material onto rail cars and 18-wheel truck beds.

(CX 35, p. 8-9) (Tr. 117-19; 121-24; 137-19).

Mr. Pennington testified that positions such as sweeper driver, shuttle bus driver, van driver, and some delivery positions were light duty in nature, but the majority of driving jobs fall within the medium level of work. (Tr. 120). To his knowledge, Mr. Pennington testified that none of the job he listed required that Claimant not be on any medication. (Tr. 144).

On August 13, 2002, Ty Pennington and Mr. Tingle updated the labor market survey identifying positions in the Laurel, Hattiesburg, Pascagoula and Mobile areas. (CX 35, p. 10).

Howard Computers - Machine Operator. - Located in Laurel, Mississippi, this job paid $6.00 to $6.50 per hour, and the employer hired operators on a week-to-week basis. A high school diploma was not required, many of the positions were sedentary to light work, and the worker had the opportunity to sit and stand as needed throughout the workday. The applicant is responsible for operating sautering machines, coil wrappers, or line assembly of computers.

Turtle Creek Mall - Custodian & Supervisor. Located in Hattiesburg, Mississippi, the supervisor position paid $7.00 per hour. The positions were light/medium in nature and did not require a high school diploma.

Pizza Hut - Delivery Driver. Located in Laurel, Mississippi, this job paid $6.50 to $8.00 based on the percentage of deliveries made. The position was light level, and an individual had the opportunity to sit or stand subject to the driving requirements. No high school diploma was necessary.

Pinkerton Security Services - Security Guard. Located in Pascagoula, Mississippi, this job paid $5.90 per hour. The job entailed work at light level of demand, required occasional bending and stooping, and frequent reaching and handling. Assignments were normally available in guarding a gate or a construction entrance neither of which entailed making rounds. The worker had the opportunity to change positions on a periodic basis. A high school diploma was not required. Job specifics included: controlling entry to and from a facility, preventing loss of company assets, checking in delivery drivers, and providing information to visitors of the facility.

Kelly Brothers Construction - Dump Truck Driver. Located in Waynesboro, Mississippi, this job paid $9.50 per hour. The position was classified as medium level work, however the majority of the time was spent driving to and from work sites. Anyone with some experience would have a good opportunity to be considered for this position.

Sickle Cell Disease Association - Driver. Located in Mobile, Alabama, this position paid approximately $6.00 per hour. The job entailed transporting clients to and from clinics, and transporting students from their regularly assigned school to the after-school program held at the association. An excellent driving record was required along with the ability to pass a criminal background check.

Nyco Security - Security Guard. Located in Mobile, Alabama, this job paid $5.75 per hour. The position required a light level of exertion and entailed making routine rounds at off site contacts. No high school diploma was required, but some positions may required the ability to fill out reports of daily activities.

Godfather's Pizza - Delivery Driver. Located in Mobile, Alabama, this job paid $5.50 to $6.25 per hour plus tips. This position was light in nature and did not require a high school diploma. The position required a valid drivers license and a good working knowledge of the Mobile area, which Claimant did not possess.

Van Elmore Services - Sweeper Driver. Located in Mobile, Alabama, this job paid $6.50 per hour. The position was light in nature and required operation a sweeper machine to clean parking lots and other assigned contract areas. Training was provided and the job required frequent reaching and handling. A high school diploma was not required.

Mobile Transportation Services - Shuttle Bus Driver. Located in Mobile, Alabama, this job paid $6.00 to $6.50 per hour. The positions was light in nature, required occasional bending and stooping, and frequent reaching and handling. Job duties included providing transportation services in the area. The position did not require a high school diploma, however, it did require a clean driving record, and the ability to pass a drug test. There were no openings for such a position on August 13, 2002.

Cleveland Florist - Delivery Driver. Located in Mobile, Alabama, this job paid $6.75 per hour. The position did not require a high school diploma, however, it did require a clean driving record and a good working knowledge of the area. This position was light to light/medium in nature.

(CX 35, p. 11-12).

IV. DISCUSSION

A. Contention of the Parties

Claimant argues that he established a *prima facie* case of causation and is thus entitled to the presumption under Section 20 of the Act. Claimant also asserted that Employer failed to present any evidence to rebut his *prima facie* case of causation, much less defeat Claimant's showing based on the record as a whole that his injuries were related to his employment. Claimant further contends that he reached maximum medical improvement on December 11, 2000, crediting the recommendations of Drs. Folse and Beam, over that of Dr. Bernardo, after considering the fact that Claimant's condition deteriorated after being released by Dr. Bernardo and Dr. Bernardo continued to treat Claimant's problems. As a result of his injuries, Claimant contends that he is totally and permanently disabled because he could not perform his former job and Employer failed to demonstrate suitable

alternative employment. Specifically, Claimant contends that the jobs he obtained following his termination with Employer were not suitable because he was not physically able to perform the jobs. *In arguendo*, Claimant asserts that if Employer established suitable alternative employment, it can only be based on the August 13, 2002 labor market survey. Regarding medical benefits, Claimant stated that Employer agreed to pay for Botox treatments, and pay Dr. Bernardo. However, Claimant asserts his private insurance carrier has an outstanding lien and Claimant still owes medical bills not covered by his private insurer.

Employer contends that Claimant reached maximum medical improvement on May 24, 1999, based on the opinions of Drs. Lee and Bernardo. Employer further argues that Claimant could have worked light duty at its facility and suffer very little, if any wage losses, and the fact that Claimant violated company rules by waiting eighteen days was grounds for termination, which relieved Employer of any duty it had to offer light duty work. Employer also contends that Claimant's choice of physician was Dr. Bernardo, a neurosurgeon, and Claimant never received permission to change physicians under the Act. Thus, Employer asserts that it should not be liable to pay for any medical treatment, excluding that of Dr. Bernardo, considering the fact that Claimant never requested a change in physicians. Additionally, Employer argues that because Claimant was released to work with no restrictions by Dr. Bernardo in May, 1999, and Claimant did not present to Dr. McCloskey until January 2000 with symptoms different from those related to Mr. Bernardo, then Claimant's January, 2000 complaints were due to a new injury suffered sometime after July 1999, when he began his truck driving employment. In the alternative, Employer contends that it should only be liable for fifty percent of Claimant's current disability, if any, based on the causation analysis of Dr. Lee.

B. Causation

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2000); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995); *Addison v. Ryan Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 101 (1986). To rebut the Section 20(a) presumption, the Employer must present substantial evidence that a claimant's condition is not caused by a work-related accident or that the work-related accident did not aggravate the claimant's underlying condition. *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966); *Kubin*, 29 BRBS at 119.

B(1) Prima Facie Case

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1)

the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. Here, Claimant testified that he suffered an injury at work while lifting iron on or about April 19, 1999. (Tr. 48). Substantiating the fact that Claimant suffered an injury was a statement by Michael Fountain Jr., who was present at the time of the injury, that Claimant hurt his back on April 22, 1999. (CX 11 p. 2). Regarding the causation of Claimant's abnormal discs, Dr. Beam stated:

> Well, the degenerative disk changes can happen over time. Those can happen with people who with their particular job put a lot of stress on their back. The herniated disk probably was related to the work that he was doing. As I understand it, there's a lot of bending, stooping, lifting. It's also true that over the course of time that due to disk problems themselves can come from heavy use of the back. So it would be my opinion that as physical laborer, or as I understand his job to be, over the course of his work of heavy lifting, bending, and stooping he injured his back.

(CX 15, p. 8).

Inasmuch as Claimant established that he was lifting heavy channel iron at the time of the accident, another employee witnessed the injury, Dr. Beam, as well as other physicians of record, linked Claimant's back symptoms to his workplace accident, I find that Claimant established a *prima facie* case of causation.

B(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc.*, 194 F.3d at 687-88 (citing, *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999)(stating that the hurdle is far lower than a "ruling out" standard).

Employer demonstrated that Claimant gave several different versions of how he injured his back to different people at different times. Specifically, Claimant told Employer on May 3, 1999 that he injured his back on April 22, 1999, while working with iron. (CX 11, p. 1). Yet, on April 19, 1999, Claimant presented to Wesley Medical Center complaining of lower back pain, medical notations indicated that the pain was due to an old motor vehicle accident, and Claimant returned to the hospital on April 22, 1999, complaining that his lower back pain was not any better. (CX 16, p. 1, 5). On April 29, 1999, Claimant explained to Dr. Bernardo that he was in his usual state of health until one week ago when he awoke with back pain. (CX 17, p. 2). On January 4, 2000, Claimant told Dr. McCloskey that his low back pain originated at work on April 12, 1999. (CX 21, p. 11). Additionally, Employer argues that Claimant's current condition is a result of an intervening cause by pointing to testimony by Dr. Lee that fifty percent of Claimant's disability was attributed to his work at driving trucks or other equipment, or to some subsequent injury. (EX 40, p. 25).

I do not find that any of the above inconsistencies are sufficient to rebut Claimant's *prima facie* case of causation. In Claimant's psychological and psychometric evaluation, Claimant demonstrated the ability to communicate at the ten year old level and his evaluator opined that Claimant was mildly retarded. (CX 23, p. 2). Furthermore, the medical notations indicating that Claimant suffered an aggravation to his back due to an old motor vehicle accident are not credible considering that Claimant never injured his low back in his June 30, 1995 automobile accident. (EX 27, p. 1-2). Accordingly, nearly all of Claimant statements indicate that he suffered an injury at work between April 12, 1999 and April 22, 1999, I find that there is insufficient evidence to rebut Claimant's *prima facie* showing of causation. Additionally, Dr. Lee's statement that fifty percent of Claimant's disability was attributable to Claimant's post-injury third-party employment fails rebut Claimant's *prima facie* case because Dr. Lee's statements fail to establish that any subsequent injury[2] was not the "natural and unavoidable result of the initial work injury." *White v. Peterson Boat Building Co.*, 29 BRBS 1, 9 (1995).

C. Nature and Extent of Disability and Date of Maximum Medial Improvement

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from

[2] There is no evidence in the record that Claimant sustained an injury while driving a truck. Rather, as Dr. Beam explained, Claimant's driving put him at an increased risk of aggravating his low back muscles. (EX 36, p. 29-20). Likewise, Dr. McKellar noted that Claimant's pain levels significantly improved once Claimant stopped driving trucks. (CX 22, p. 33). Thus, even if Dr. Lee's statement that fifty percent of Claimant's disability was sufficient to overcome Claimant's *prima facie* case, I find that based on the record as a whole there was no second injury eliminating the causal link between Claimant's current status and his workplace injury.

one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement.

The determination of when maximum medical improvement is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

C(1) Nature of Claimant's Injury

On April 19 & 22, 1999, Claimant presented to Wesley Medical Center complaining of lower back pain. (CX 16, p. 1, 5). An April 23, 1999 lumbar MRI demonstrated: degenerative changes at L6-S1 with a small disc protrusion that was not significantly impinging on the thecal sac or encroaching on the neural foramina. *Id*. at 10. On April 29, 1999, Dr. Bernardo evaluated Claimant and assessed a severe lumbar sprain/strain, but he opined that Claimant did not have any neurosurgical operative problems. (CX 17, p. 3). On May 19, 1999, Dr. Bernardo reported that Claimant had improved dramatically with physical therapy, Claimant was no longer experiencing discomfort in his lower back, and even though Claimant continued to exhibit paraspinous muscle spasm, Dr. Bernardo released Claimant from his care. *Id*. at 8.

Claimant did not return to see Dr. Bernardo until October 18, 1999, when he complained of lower back pain that began in late September. (CX 17, p. 9). A physical exam revealed that Claimant no longer had back spasms, and Dr. Bernardo explained that Claimant was merely experiencing problems secondary to his lumbar sprain/strain. *Id*. After complaining about back pain to Dr. Duffield, Claimant underwent two x-rays for comparison with an MRI and those November 7, 1999 reports revealed an essentially negative lumbar study, with the MRI showing degenerative disc disease at L6-S1 with a mild disc protrusion. (EX 18, p. 6-7). Comparing Claimant's November 7, 1999 MRI with his April, 1999, MRI revealed Claimant's lumbar spine was essentially unchanged. *Id*. at 7.

On January 4, 2000, Claimant began treatment with Dr. McCloskey, a neurosurgeon, for severe low back and leg pains. (CX 21, p. 1). Dr. McCloskey opined that Claimant had symptomatic degenerative spondylosis with a small disc herniation at L5. *Id*. at 12. Dr. McCloskey did not think Claimant had a problems that should be corrected by surgery. *Id*. at 12. After having Claimant's x-

rays reviewed by a respected radiologist Dr. McCloskey indicated on January 12, 2000, that Claimant did not have spondylosis. *Id*. at 20.

On March 31, 2000, McCloskey referred Claimant to Dr. McKellar, a pain management specialist, for an evaluation of Claimant regarding degenerative spondylosis. (CX 22, p. 2). Claimant related to Dr. McKellar on April 24, 2000, that his pain was a six on a zero to ten scale, and picking up anything aggravated his symptoms. *Id*. at 5. After conducting an examination of Claimant, Dr. McKellar assessed lumbar spondylosis and lumbar sprain/strain. *Id*. Thereafter, Claimant underwent a series of epidural steroid injections which failed to provide him with any significant relief. (CX 22, p. 33). However, Claimant experienced significant pain relief between June 21, 2000 and July 6, 2000 when he quit driving trucks.
Id.

On October 9, 2000, Dr. Folse evaluated Claimant due to his complaints of low back pain after Claimant complained to personnel at Forest General Hospital of a new shocking type pain extending down his right leg. (CX 24, p. 4). Dr. Folse assessed chronic low back pain with a recent change to radicular type symptoms. *Id*. at 5. On November 6, 2000, Claimant reported that physical therapy improved his symptoms but he continued to experience some paraspinal tightness in his right lower side. (CX 24, p. 7). Dr. Folse's new assessment was chronic low pack pain with right paraspinal tightness. *Id*. On December 5, 2000, Claimant underwent a third MRI, and Dr. Folse opined that it demonstrated degenerative disc desiccatory changes at L6-S1 with a small disc protrusion that did not impinge on the thecal sac. *Id*. at 9; (CX 18, p. 2). On February 6, 2001, Dr. Beam, an expert in the field of occupational medicine, evaluated Claimant on the referral of Dr. Folse. (CX 25, p. 3). Dr. Beam's assessment of Claimant's condition was chronic low back pain and degenerative disc disease at L6-S1 as demonstrated in his MRI. *Id*. at 4.

On March 22, 2001, Dr. Folse assessed some mild degenerative disc disease, and on July 31, 2001, Claimant continued to complain of significant right paraspinal muscle tightness. (CX 24, p. 10-11). Dr. Folse assessed low back pain with right muscle paraspinal spasms of an unknown etiology. *Id*. at 11. Meanwhile, Claimant sought treatment for his back pain from Dr. Duffield, who remarked that Claimant's back pain had remarkably improved with the use of a back brace. (CX 27, p. 1). On October 4, 2001, Dr. Folse noted that Claimant had an EMG which demonstrated some positive EDB, but an October 23, 2001 follow up EMG confirmed her suspicions that Claimant's positive reading was due to unrelated shoe trauma. (CX 24, p. 3, 6). An MRI of the lumbar spine taken on November 7, 2001 demonstrated: a mild disc protrusion at L6-S1 and an even milder disc protrusion at L5-6. (CX 18, p. 3). There was still no significant impingement on the exiting nerve root or compromise of the thecal sac. *Id*. In all, the MRI was essentially unchanged from the prior study of April, 1999. *Id*. Regarding Claimant's continued muscle spasms, Dr. Beam stated that the spasms could start again with work activities, by sitting or standing too long, or by putting the body in a position that caused muscle tension. (EX 36, p. 44).

On May 8, 2002, Claimant had another MRI which revealed: L6-S1 spondylosis, grade 1; a minor L6-S1 disc herniation slightly indenting the thecal sac; and the radiologist opined that the MRI was unchanged from the study done on November 7, 2001. (CX 18, p. 5).

On August 19, 2002, Dr. Lee, a neurologist, evaluated Claimant on a referral from Dr. Folse. (CX 37, p. 1). Dr. Lee noted some paraspinous spasms on Claimant's right side, and Dr. Lee's impression was that Claimant had mechanical back pain syndrome and paraspinous myofascial pain on the right side. *Id*. at 2-3. On September 30, 2002, Dr. Lee noted that Claimant had excellent pain relief from using an LSO brace, but Claimant continued to complain of paraspinous muscle pain, which was also present in Claimant's physical exam. *Id*. at 4. Claimant also underwent a discogram and the results of that test were "fairly normal." *Id*. Also, three views of Claimant's lumbar spine on September 13, 2002, following his discogram were normal, and a CT of his lumbar spine was normal. *Id*. at 5-6. Dr. Lee reiterated his impression of myofascial pain syndrome. *Id*. at 4. Dr. Lee opined that Claimant's spinal defect at L6-S1 was congenital, and that the earlier MRIs did not reveal any acute herniations. (EX 40, p. 11). On October 3, 2002, Dr. Staggs evaluated Claimant on the referral from Dr. Beam and she concurred that a series of Botox injections into Claimant's lumbar muscles was appropriate. (CX 37, p. 8).

Accordingly, I find that the nature of Claimant's injury is such that he does not have any neurosurgical operative problems to his lumbar spine. Rather, Claimant has chronic low back pain with paraspinal tightness/myofascial pain syndrome. Additionally, Claimant likely suffers from lumbar spondylosis and an asymptomatic disc herniation/bulge at L6-S1.

C(2) Extent of Claimant's Injury

On April 19 & 22, 1999, Claimant presented to Wesley Medical Center complaining of lower back pain. (CX 16, p. 1, 5). On April 22, 1999, Dr. McKellar recommended that Claimant not return to work until an MRI could be obtained. *Id*. at 6. Claimant underwent the MRI the following day. *Id*. at 10.

On April 29, 1999, Dr. Bernardo began treating Claimant for low back pain and Dr. Bernardo kept Claimant off from work until May 19, 1999, while he underwent three weeks of physical therapy. (CX 17, p. 3-4). On May 19, 1999, Dr. Bernardo reported that Claimant had improved dramatically with physical therapy, and Claimant was no longer experiencing discomfort in his lower back. *Id*. at 8. Claimant continued to exhibit paraspinous muscle spasm, and because Claimant was anxious to return to work, Dr. Bernardo released Claimant to begin work on Monday, May 24, 1999, as Claimant requested, without any work restrictions. *Id*. In his deposition, Dr. Bernardo explained that his releasing Claimant to return to work without restrictions on May 24, 1999, was based on his medical opinion and if he believed Claimant needed some work restrictions he would have issued them. (EX 34, p. 16-17). When Claimant attempted to return to work he continued to experience pain, and believing that he was not needed because he could not perform his former job, Claimant quit to obtain truck driving employment. (Tr. 52-54). During the course of the trial, counsels stipulated

that the nature of Claimant's former job was "fairly heavy" work. (Tr. 92). Mr. Pennington, Employer's vocational expert testified that the majority of truck driving jobs were medium in nature. (Tr. 120).

On October 18, 1999, Claimant returned to Dr. Bernardo after an onset of back pain, but Dr. Bernardo opined that it was merely secondary to his earlier lumbar strain and he did not think Claimant's problems were sufficient to issue any work restrictions. (CX 17, p. 9; (EX 34, p. 19).

On March 31, 2000, Claimant related to Dr. McKellar that his pain was a six on a zero to ten scale, and picking up anything aggravated his symptoms. (CX 22, p. 5). After a series of failed epidural steroid injections, Dr. McKellar recommended that Claimant quit his job driving trucks for a two week period beginning after June 21, 2000, to see if his truck driving was the cause of his back pain. (EX 14, p. 3). On July 6, 2000, Claimant related that he was no longer driving a truck ten to twelve hours a day, his pain had decreased to a level of three on a ten point scale, and Claimant reported that he did not have to take any pain medication while he was not working. (CX 22, p. 33). Dr. McKellar recommended that Claimant find another line of work in the light to moderate category where he could change positions frequently. *Id*.

On March 22, 2001, Dr. Folse reported that Claimant was unable to have gainful employment because he could not perform manual labor, and he was mildly mentally retarded with deficits in reading and writing. (CX 24, p. 11). Meanwhile, Dr. Folse prescribed six weeks of aggressive physical therapy for lumbar stabilization in an attempt to end Claimant's muscle spasms. *Id*. On October 4, 2001, after reviewing Claimant's EMG studies, Dr. Folse recommended that Claimant return to work with the restriction that he not engage in lifting over fifteen pounds, and not engage in any repetitive bending or stooping. *Id*. at 6.

On December 27, 2000, Claimant had a functional capacity evaluation and his evaluators opined that Claimant could perform work in the light category of exertion for an eight hour work day. (CX 26, p. 1). Claimant fully participated in the all but one task, in which he exhibited self-limited participation by stopping due to pulling in the right side of his back and right leg pain. *Id*. Claimant could occasionally lift fifteen pounds, work above his head, work sitting, work stooping, and engage in repetitive squats. *Id*. at 2. Claimant could frequently sit, stand, kneel, work squatting, climb stairs, walk, crawl, climb ladders, and rotate his trunk. *Id*.

On February 6, 2001, Claimant related to Dr. Beam that his pain level varied, and a couple of times a week his back muscles would "flatten out," nearly incapacitating Claimant from walking and incapacitating him from any type of work. (CX 25, p. 3). Reviewing Claimant's functional capacity evaluation, Dr. Beam concurred that Claimant was capable to working light duty, and Dr. Beam assigned Claimant a five percent permanent impairment rating to the body as a whole. *Id*. On June 28, 2001, Dr. Duffield recommended that Claimant undergo vocational training considering the fact that Claimant was not able to continue driving a truck or to perform construction work. (CX 27, p. 3).

On October 1, 2001, Dr. Beam completed a work restriction evaluation in which he recommended that Claimant could engage in intermittent sitting, walking, lifting, squatting, and climbing, but Claimant should not engage in any bending, kneeling or twisting. (CX 25, p. 1). Claimant could stand as long as four hours a day, he could occasionally reach above his shoulders, and he was capable of working an eight hour day. *Id*. Claimant was not capable of using his feet to operate foot controls for repetitive movement, and he was only able to lift ten to twenty pounds. *Id*.; (CX 15, p. 9). The work restrictions he issued for Claimant on October 1, 2001 were permanent, inasmuch as Claimant suffered permanent damage to the muscles in his back. *Id*.; (EX 36, p. 42-43). Once a muscle spasms stopped, it could start again with work activities, by sitting or standing too long, or by putting the body in a position that caused muscle tension. *Id*. at 44.

In explaining why Claimant should not operate repetitive foot controls, Dr. Beam stated that Claimant could use his feet for control, but he did not feel comfortable in stating that Claimant could repetitively operate a clutch due to the fact that Claimant has back pain and spasm. (EX 36, p. 9-10). Claimant was at an increased risk of danger in operating anything with foot pedals, which included his personal automobile. Claimant could drive if a job was considered light work, but the more twisting, turning, and sitting involved in driving the more problems Claimant was likely to have with his back. *Id*. at 17. Under reasonable conditions, Claimant could operate a car or a pick-up truck, but operating heavy equipment, such as dump trucks or other heavy machinery, that requires a lot of clutching and which bounce the vehicle occupant around, was not a good idea. *Id*. at 26-27.

Accordingly, I find that the extent of Claimant's injury is such that Claimant was totally disabled from the date of his workplace accident on April 15, 1999, to May 24, 1999 at which time Dr. Bernardo released Claimant to return to work without restrictions. Claimant, however, was not able to perform his former job, which required a heavy level of exertion, but he was able to work driving a truck at Kent Hillman Logging beginning in July, 1999, for a period of about nine months. Unfortunately, the nature of Claimant's injury did not allow him to perform his truck driving employment without aggravating his paraspinal tightness/myofascial pain syndrome, and Claimant sought treatment from Dr. Bernardo on October 18, 1999, and from Dr. McCloskey on January 4, 2000. Further proof that Claimant's truck driving employment aggravated the nature of his workplace injury was demonstrated by Claimant who reported a significant decrease in his level of pain after Dr. McKellar recommended in his June 21, 2000 consultation that Claimant stop truck-driving for a two-week period.

Because Claimant was not able to engage in heavy work following Dr. Bernardo's May 24, 1999 release, and because Claimant could not effectively engage in medium level work without aggravating the symptoms of his workplace injury, I find that Claimant was capable of engaging in light duty work after May 24, 1999, as recommended by Drs. McKellar, Folse, and Beam, and as detailed in Claimant's December 27, 2000 functional capacity evaluation. More specifically, I find that Claimant was capable of light level work for a eight hour day with no lifting over fifteen pounds, no repetitive bending, stooping, or twisting. Additionally, Claimant should not engage in operating heavy equipment when such operation required a lot of clutching, bouncing, twisting, and turning. Claimant needs to change positions frequently throughout the day, and he is capable of occasionally

working above his head, sitting, and squatting, and he could frequently sit, stand, kneel, squat, crawl, walk, climb and rotate his trunk.

C(3) Maximum Medical Improvement

On May 19, 1999, Dr. Bernardo reported that Claimant had improved dramatically with physical therapy, and Claimant was no longer experiencing discomfort in his lower back. (CX 17, p. 8). Although Claimant continued to exhibit paraspinous muscle spasm, Claimant was anxious to return to work, and Dr. Bernardo released Claimant to begin work on Monday, May 24, 1999, without any restrictions. *Id*. Claimant, however, was not able to perform his former job, and he obtained alternative employment as a truck driver. (Tr. 52-54). Claimant continued to seek treatment for his work related injuries from Dr. Bernardo on October 18, 1999, Dr. McCloskey on January 4, 2000, Dr. McKellar on March 31, 2000, and Dr. Folse on October 9, 2000. (CX 17, p. 9; CX 21, p. 1; CX 22, p. 2; CX 24, p. 4).

On December 11, 2000, Dr. Folse reported that Claimant had reached maximum medical improvement after she had sent Claimant to physical therapy, administered epidural steroid injections, and reviewed Claimant's diagnostic studies. (CX 24, p. 9). On March 22, 2001, Dr. Folse noted that Claimant had significant right paraspinal muscle tightness, and she prescribed six weeks of aggressive physical therapy for lumbar stabilization in an attempt to end Claimant's muscle spasms, as well as EMG tests. *Id*. at 11. On October 23, 2001, Dr. Folse reported that the subsequent EMG was negative, and she recommended that Claimant return to work with restrictions. *Id*. at 6.

On February 6, 2001, Dr. Beam reviewed Claimant's functional capacity evaluation, concurred that Claimant was capable to working light duty, and Dr. Beam assigned Claimant a five percent permanent impairment rating to the body as a whole. *Id*. Dr. Beam also concurred that Dr. Folse's treatments were appropriate, and he related that Claimant had more than adequate treatment for his condition. *Id*. In Dr. Beam's opinion, Claimant had reached maximum medical improvement on February 6, 2001. (CX 25, p. 1). After reviewing the records of Dr. Folse in his deposition, Dr. Beam re-evaluated his position on Claimant's date of maximum medical improvement, opining instead that Claimant had reached maximum medical improvement on December 11, 2000, as indicated by Dr. Folse, because Claimant had no changes in his complaints by the time of his February 6, 2001 evaluation. (CX 15, p. 8).

On December 8, 2002, Dr. Lee wrote to Claimant's attorney that he could not determine a permanent impairment rating for Claimant until after he underwent a trial of Botox injections, and Claimant was not at maximum medical improvement until such time as Dr. Staggs recommendation for Botox injections had been carried out. (CX 37, p. 9). After being presented with selections of Dr. Bernardo's records, Dr. Lee stated that Claimant seemed to have reached maximum medical improvement on May 24, 1999. (EX 40, p. 22).

As the Board in *Lusby v. Washington Metropolitan Transit Authority*, 13 BRBS 446, 447 (1981) stated: "In some instances, it is difficult to ascertain if claimant's condition has stabilized; in

such cases, however, where a condition has lasted for a lengthy or indefinite duration, as distinguished from one in which recovery awaits a normal healing period, it has been found that claimant's condition has reached maximum medical improvement and therefore must be described as permanent." Likewise, the Fifth Circuit in *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654-55 (5th Cir. 1968), reiterated that there were no "hard and fast" rules for determining when an injury was permanent, and a finding that an injury is temporary need not be reached merely because the claimant's prognosis is that he is likely to get better in the indefinite future.

In this case, Claimant's paraspinal tightness/myofascial pain syndrome may well become better in the future with his treatment of Botox injections or through the body's natural healing abilities. As explained by Dr. Beam, the damage to Claimant's back muscles was permanent and his muscle spasms could start again with work activity, by sitting or standing too long, or by placing his body in a position that caused muscle tension. (EX 36, p. 42-44). Reviewing Dr. Bernardo's records, Dr. Lee stated that Claimant appeared to have reached maximum medical improvement on May 24, 1999. (EX 40, p. 22). With Dr. Beam and Lee's opinions in mind, I find that Claimant's back condition had stabilized by May 24, 1999. As of that date, Dr. Bernardo had treated Claimant since April 29, 1999, he had witnessed a dramatic improvement in Claimant's condition with physical therapy, and he instructed Claimant to return for treatment only as needed. (CX 17, p. 8). Following his release, Claimant was able to engage in nine months of truck driving employment, with periodic aggravation of his paraspinal tightness/myofascial pain syndrome as described by Dr. Beam. Additional evidence that Claimant's condition had stabilized is the fact that his April 23, 1999 lumbar MRI was nearly identical to his May 8, 2002 MRI. (CX 16, p. 10; CX 18, p. 5). Furthermore, Dr. Folse's opinion that Claimant had reached maximum medical improvement on December 11, 2000, was made without the benefits of Dr. Bernardo's medical records.[3] (CX 24). Accordingly, I find that Claimant's condition had stabilized by May 24, 1999, and the treatment Claimant received after that date most likely related to aggravations of Claimant's paraspinal tightness/myofascial pain syndrome.

D. *Prima Facie* Case of Total Disability and Suitable Alternative Employment

D(1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not

[3] Dr. Folse was aware that Claimant had sought treatment with Dr. Bernardo, as indicated in her October 9, 2000 report, where she stated: "He has been seen by Dr. Bernardo in the past who states there was nothing they could do for him, as per patient." (CX 24, p. 4). There is no evidence that Dr. Folse requested Dr. Bernardo's records.

establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, Employer conceded that Claimant can no longer perform his former longshore job, and Claimant established that he attempted to return to his former job but was not able, thus, Claimant established a *prima facie* case of total disability following his April 15, 1999 workplace accident.

D(2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). An Employer may establish suitable alternative employment retroactively to the day when the Claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540. 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

D(2)(a) Claimant's Age Background, Experience, and Physical Limitations

Claimant testified that he was born in October, 1964, he completed the Seventh grade in school, and he possessed a commercial drivers license. (Tr. 46, 79). In an August 15, 2000 psychological and psychometric evaluation, Claimant demonstrated an ability to function at the First grade level in reading and spelling, and he was able to function at the Fifth grade level in arithmetic. (CX 23, p. 2). Claimant had a social age equivalency of a seventeen year old, with the ability to communicate at the ten year old level. *Id*. Claimant has specific learning disabilities in reading and spelling, he is moderately retarded academically in reading and spelling, and mildly retarded in adaptive behavior functioning. *Id*. at 3. Mr. Tingle opined that Claimant's testing indicated that he was functionally illiterate. (CX 35, p. 3). Claimant's work history consisted of truck driving, construction, and outrigging. (CX 23, p. 1). As a result of his April 15, 1999 workplace injury, Claimant suffers from chronic low back pain with paraspinal tightness/myofascial pain syndrome. Additionally, Claimant likely suffers from lumbar spondylosis and an asymptomatic disc herniation/bulge at L6-S1. As a result of his workplace injury, Claimant became capable of light duty employment for an eight hour day on May 24, 1999, with the specific restrictions of: no lifting over fifteen pounds, no repetitive bending, stooping, or twisting; no engaging in activity that required a lot of clutching, bouncing, twisting, and turning; no more than occasional working above the head, sitting, and squatting; no more than frequent sitting, standing, kneeling, squatting, crawling, walking, climbing and rotating of the trunk.

D(2)(b) Evidence of Suitable Alternative Employment

(2)(b)(i) Light Duty Employment in Employer's Facility

An employer may meet its burden of showing that suitable alternative employment is available to a claimant by offering a claimant a light duty position within its facility. *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984). A job specifically tailored to an employee's restrictions is not sheltered so long as it involves necessary work. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 689 (5th Cir. 1996) (finding that employment was not sheltered when employer would not advertise the position if the claimant was terminated, but position was part of the regular work performed by the department); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 15 (2001)(stating that employment may be tailored to a claimant's specific restrictions as long as the work is necessary); *Darden v. Newport News Shipbuilding & Dry Dock Co.*,18 BRBS 224, 226 (1986)(same). A job is not available when it is within the employers exclusive control but the employer does not offer the job to the claimant. *Berkstresser v. Washington Metropolitan Transit Authority*, 16 BRBS 231, 234 (1984).

In this case, Employer called Ricky Parker to testify at trial that Employer had a full light duty program available to injured workers. (Tr. 162). Upon receiving a light duty slip from an injured worker, Employer would place the worker in a light duty position within his particular craft, and if no such position were available, the worker could work in the tool room, doing table top work assembling electrical kits, or perform guard duty. (Tr. 164-66).

Claimant's uncontradicted testimony established that he attempted to return to his former job, and when he asked for light duty, his new foreman, David Seaman, told him that he was not needed if he could not perform his job. (Tr. 53). Based on the record, there is insufficient evidence to show that Employer ever offered Claimant light duty work in its facility. Also, while Employer asserted that Claimant could have been terminated for failing to timely report his injury, (Tr. 161), no evidence suggests that Claimant was terminated for that reason, rather, Employer "re-evaluated" Claimant's job on June 9, 1999 due to his personal medical problems. (EX 7, p. 11). Accordingly, I find that Employer failed to demonstrate the availability of suitable alternative employment within its facility because it never offered Claimant light duty work after Claimant complained that he could not perform his former job.

D(2)(b)(ii) Claimant's Post-Injury Employment

In determining wage earning capacity Section 8(h) provides that a claimant's earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his true earning capacity. 33 U.S.C. § 908(h) (2002). Accordingly, Section 8(h) provides a two-step process to determine post-injury wage earning capacity. First, one must consider whether a claimant's post-injury wages accurately reflect actual wage earning capacity. If so, then the second step need not be reached. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 797 (D.C. Cir. 1984). If not, then one must consider the claimant's actual capacity for gainful employment. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 797 (D.C. Cir. 1984); *Walsh v. Northfolk Dredging Co.*, 878 F.2d 380, 1989 WL 68806 (4th Cir. 1989) (Table); *Beck v. Newport News Shipbuilding and Dry Dock Co.*, 33 BRBS 543, 545 (1999).

"An award of total disability while a claimant is working is the exception and not the rule." *Carter v. General Elevator Co.*, 14 BRBS 90, 97 (1981). *See also Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). An injured employee working in pain or in sheltered employment may receive total disability even though they continue to work. *See Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980) (sheltered employment); *Shoemaker v. Schiavone & Sons Inc.*, 11 BRBS 33, 37 (1979) (extraordinary effort); *Walker v. Pacific Architects & Engineers*, 1 BRBS 145, 147-48 (1974) (beneficent employer). If the claimant is performing satisfactorily and for pay, then barring other signs of beneficence or extraordinary effort, the work precludes an award for total disability. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 334 (1981). Furthermore, it is not proper for the fact finder to consider jobs that are too physically demanding for a claimant to perform. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944 (5th Cir. 1991); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1330 (9th Cir. 1980); *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). A claimant's credible reports of pain, supported by the record, may also negate ability to earn post-injury wages and justify an award for compensation. *Ceres Marine Terminal v. Hinton*, 243 F.2d 222, 225 (5th Cir. 2001); *Eller and Co. v. Golden*, 620 F. 2d 71, 74 (5th Cir. 1980); *Royce v. Elrich Construction Co.*, 17 BRBS 157, 159 (1985).

In this case, Claimant obtained a job with Kent Hillman Logging as a truck driver for approximately nine months, and when work tapered off, Claimant obtained employment as a dump truck driver. (Tr. 54-55). Claimant quit driving trucks after Dr. McKellar informed him in that he

would continue to aggravate his back if he persisted in his truck driving employment. (Tr. 56; EX 14, p. 3). Likewise, Dr. Beam advised against any driving employment as it put Claimant at an increased risk for aggravating his back. (CX 36, p. 9-10, 17, 26-27). Therefore, crediting the opinion of Dr. Beam, the report of Dr. McKellar, and Claimant's testimony that his pain significantly improved after his quit driving, I find that the jobs Claimant obtained following his workplace accident are not suitable alternative employment and do not establish Claimant's post-injury wage earning capacity.

D(2)(b)(iii) Labor Market Surveys of Ty Pennington and Leon Tingle

As noted *supra*, Part III(d)(15), Mr. Pennington identified numerous jobs which he thought were suitable for Claimant after considering his age, background, experience, and physical limitations. Based on the record, I find that the jobs as a janitor for Jackson County, a road machine operator for Jackson County, a boom truck driver for Superior Building Supply, a lowboy and dump truck driver for Nordan Contracting, and a dump truck driver in Laurel, Mississippi, were not suitable for Claimant because they require a light to medium or medium level of exertion, which exceeds Claimant's max lifting restrictions of fifteen pounds.[4] Also, Claimant is functionally illiterate, and his does not possess

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[4] Sedentary Work is defined as: "Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met." DICTIONARY OF OCCUPATIONAL TITLES Appendix C (4th ed. 1991).

Light Work is defined as: "Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible." *Id*.

Medium Work is defined as: "Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work." *Id*.

a GED. Thus, I find that Claimant cannot meet the basic requirements for the shuttle bus/jockey driver with Finch Logistics.

Also, Mr. Tingle reported that Claimant lived in Richton, Mississippi, and he identified jobs in Pascagoula, Mississippi, and Mobile, Alabama. Both Pascagoula and Mobile are approximately eighty-three miles from Claimant's home, for an estimate trip of around two hours one way. *See* www.mapquest.com. Jobs in this area were identified because Employer was located in Pascagoula, Mississippi. (CX 35, p. 7). Also, Clamant was living in Richton at the time he was hired. (CX 9, p. 2). The Fifth Circuit in *Turner*, 661 F.2d at 1042-43, requires that an employer identify jobs in a claimant's local community. The Board had interpreted "local community" to include the community where the injury occurred or where the claimant resided. *Jameson v. Marine Terminals*, 10 BRBS 194 (1979). The board has also determined that jobs located over sixty-five miles away were not with a clamant's local community even when the clamant traveled such distances prior to his injury. *Kilsby v. Diamond M. Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).

In addition to jobs in Pascagoula and Mobile being located nearly eighty-three miles from Claimant's home, Dr. Beam stated that Claimant was at an increased risk of danger in operating anything with foot pedals, including his personal automobile. (EX 36, p. 9-10). While Claimant could drive, the more twisting, turning, and turning involved, the more Claimant increased his risk of aggravating his injury. *Id*. at 17. Furthermore, when Claimant began commuting to Pascagoula at the start of his employment in 1990, his starting pay was $13.00 per hour, and by September 1998, he had received merit increases to $15.00 per hour. (CX 10, p. 1; EX 7, p. 13). Traveling nearly eighty-three miles for an average weekly wage of $784.12 is, in part, an economic choice and a worker would have less economic incentive to travel that distance for an hourly wage ranging from $6.50 to $10.00 per hour. Accordingly, I find that the jobs identified by Employer's vocational experts in Pascagoula and Mobile are not suitable for Claimant because there are located approximately eighty-three miles and two hours from Claimant's residence, Dr. Beam cautioned against operating automobiles, and the identified jobs pay substantially less than what Claimant was earning while working for Employer.[5]

Finally, I do not find that the position as a bus driver in Hattiesburg, Mississippi constitutes suitable alternative employment for Claimant. First, the job required maintaining bus reports and records and Claimant is functionally illiterate. Second, Dr. Beam cautioned against any type of employment that entailed driving, because driving put Claimant at an increased risk of aggravating his symptoms. Accordingly, I find that Employer failed to demonstrate the availability of suitable alternative employment on July 5, 2000.

On August 13, 2002, Employer's vocational experts identified eleven other positions as suitable for Claimant. For the reasons stated above, I do not find that the jobs as a security guard for

[5] The job as a forklift operator for a company in New Augusta, Mississippi is not suitable for the same reasons. New Augusta is located approximately eighty-seven miles from Claimant's residence. *See* www.mapquest.com

Pinkerton Security, a driver for Sickle Cell Disease Association, a delivery driver for Godfather's Pizza, a sweeper driver for VanElmore Services, or a shuttle bus driver for Mobile Transportation Services are suitable for Claimant given the fact that they either were: located approximately eighty-three miles from Claimant's residence or entailed extensive driving. I do not find that the position as a custodian/supervisor at Turtle Creek Mall, or the position as a dump truck driver from Kelly Brothers Construction are suitable because the jobs require lifting at a light-medium or a medium level of exertion, which violates Claimant fifteen pound lifting restrictions. I do not find that a job as a delivery driver for Pizza Hut is suitable for Claimant considering Dr. Beam's recommendations against extensive driving. On the other hand, the job as a machine operator is suitable for Claimant because it did not require a high school diploma, the position was sedentary to light in nature, and it offered the opportunity to alternate sitting and standing throughout the work day. The job paid between $6.00 and $6.50 per hour. Accordingly, I find that Employer established suitable alternative employment for Claimant on August 13, 2002 at the rate of $6.25 per hour, for a post- injury earning capacity of $250.00 per week.

An award for a partial, non-scheduled disability is based on the difference between the Claimant's pre-injury average weekly wage, and his post-injury wage earning capacity, adjusted to account for inflation to represent the wages that the post-injury job(s) paid at the time of the Claimant's injury. 33 U.S.C. § 908(e) (2002), *accord*, 33 U.S.C. § 908(c)(21) (2002); 33 U.S.C. § 908(h) (2001). *See also Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 127 n.4 (1996), *aff'd on other grounds*, 203 F.3d 664 (9th Cir. 2000) (stating that calculating for inflation "insures that a claimant's wage earning capacity is considered on equal footing with the determination under Section 10 of average weekly wage at the time of injury."). In adjusting for inflation the Board has directed that the percentage increase in the national average weekly wage (NAWW) be used rather than the percentage increase in minimum wage or cost of living. *Quan*, 30 BRBS at 127; *Richardson v. General Dynamics Corp.*, 23 BRBS 327, 331 (1990). "The NAWW is based on the national average earnings of production or non-supervisory workers on private nonagricultural payrolls and represents the average of these earnings during the three consecutive calender quarters ending on June 30 of each particular year as obtained from the Bureau of Labor Statistics." *Quan*, 30 BRBS at 127 n.3 (citing LHCA Bulletin No. 90-1; *Richardson*, 23 BRBS at 331).

The National Average Weekly Wage for the period covering the period including April 15, 1999 was $435.88. *See* U.S. Department of Labor, Employment Standards Administration, Division of Longshore and Harbor Workers' Compensation, *National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 19(f)), at* http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm (visited May 22, 2003). The National Average Weekly Wage for the period covering August 13, 2002, was $483.04, thus, the increase in the National Average Weekly Wage from the time of Claimant's accident on April 15, 1999, to the time Employer established suitable alternative employment on August 13, 2002, was 10.82%.

Reducing Claimant's August 13, 2002 earning capacity by 10.82% results in Claimant's suitable alternative employment paying an average weekly wage of $225.60. (225.60 + 10.82% = 250.00). Under Section 8(c)(21) this results in a permanent partial disability payment of $372.34. (784.12 - 225.60 = 558.52. 66 2/3 x 558.42 = 372.34).

E. Medical Authorization

Under Section 7(a) of the Act, the employer/carrier "shall furnish such medical, surgical, and other attendance or treatment, . . .for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). Under Section 7(c)(2) of the act the employer/carrier must "authorize medical treatment and care from a physician selected by an employee . . . . [and a]n employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent for such change." Section 7(d) of the Act sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by a claimant by requiring a claimant to request his employer's authorization for medical services performed by any physician. *Maguire v. Todd Shipyards Corp.*, 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981) (Miller, J., dissenting), *rev'd* on other grounds, 682 F.2d 968 (D.C.Cir.1982). When an employer refuses a claimant's request for authorization, the claimant is released from the obligation of continuing to seek approval for subsequent treatments, and thereafter need only establish that subsequent treatment was necessary for his injury in order to be entitled to such treatment at employer's expense. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). When a claimant wishes to change treating physicians, the claimant must first request consent for a change and consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. 33 U.S.C. § 907(c)(2) (2001); 20 C.F.R. § 702.406(a) (2001). *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992) (Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8 (1988).

In this case, Claimant chose Dr. Bernardo following his workplace accident as his physician without submitting a request to Employer, and he voluntarily treated with Dr. Bernardo from April to October, 1999. (CX 17). Nonetheless, Employer accepted Dr. Bernardo as Claimant's choice of physician and voluntarily paid at least some of Dr. Bernardo's bills. Thus, I find that Dr. Bernardo is Claimant's choice of physician under the Act, Employer consented to Dr. Bernardo as Claimant's choice of physician by voluntarily accepting responsibility for his medical bills, and Employer is obligated under Section 7 of the Act to pay for his medical bills to the extent that it has not already done so.

Without requesting a change of physician from Employer, Claimant switched physicians from Dr. Bernardo, a neurosurgeon, to Dr. McCloskey, also a neurosurgeon, on January 4, 2000. (CX 21, p. 1). Dr. Bernardo's last treatment date was October 18, 1999, at which time he instructed Claimant to return in six weeks. (CX 17, p. 9). Thus, Dr. Bernardo never refused to offer Claimant treatment and Claimant was not released from his obligation to request a change in his treating physician.

Accordingly, Employer was not obligated to pay for Clamant's medical treatment incurred by physicians other than Dr. Bernardo.[6]

F. Apportionment/Intervening Cause

Employer asserts that Claimant's disability should be apportioned between responsible employers such that Employer only has to pay fifty percent of Claimant's compensation pursuant to Dr. Lee's opinion that fifty percent of Claimant's current disability was due a subsequent injury. As noted, *supra*, Part IV B(2), Dr. Lee's statement failed to sever the casual link between Claimant's current disability and his workplace accident within the meaning of the Act. Apportionment of liability under these circumstance is not permitted by the Act. *See Fulks v. Avondale Shipyards, Inc.*, 10 BRBS 340 (1979); *Gangruth v. American Grain Trimmers, Inc.* 4 BRBS 114 (1976 (ALJ).

G. Section 8(f) Relief

Section 8(f) shifts a portion of the liability for permanent partial and permanent total disability from the employer to the Special Fund established by Section 44 of the Act, when the disability was not due solely to the injury which is the subject of the claim. Section 8(f) is, therefore, invoked in situations where the work-related injury combines with a pre-existing partial disability to result in a greater permanent disability than would have been caused by the subsequent injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991). Relief is not available for temporary disability, no matter how severe. *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183, 187 (1985). Section 8(f) relief is available to an employer if three requirements are established: (1) that the claimant had a pre-existing permanent disability; (2) that this partial disability was manifest to the employer; and (3) that it rendered the second injury more serious than it otherwise would have been. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989). It is the employer's burden to establish the fulfillment of each of the above elements. *See Peterson v. Colombia Marine Lines*, 21 BRBS 299, 304 (1988); *Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986).

The only evidence of a pre-existing impairment to Claimant's April, 1999, workplace accident in this case were medical records from 1995, which was prior to when Claimant began working for Employer. (CX 9, p. 1). After spending seventeen days in a hospital for injuries he sustained in a motor vehicle accident, Claimant was assessed as having fractured ribs, hemopneumothorax, hematoma of the liver, subcutaneous emphysema, multiple abrasions, and a puncture wound to the

[6] In Claimant's post-hearing brief, he asserted that Employer agreed to pay for treatment by Drs. Lee and Staggs. Claimant submitted a May 14, 2003 letter from Employer, however, which stated that Employer was only paying for further treatment in hopes of resolving the matter, and Employer stated that payment was not an acceptance of Drs. Lee and Staggs as Claimant's choice of physicians under the Act in the absence of a judicial decree.

elbow. (EX 27, p. 2). Following his motor vehicle accident Claimant was capable of working at a heavy level of exertion for Employer. No evidence in the record suggested that Employer had knowledge of Claimant's pre-existing injuries, that Claimant's motor vehicle accident resulted in a permanent impairment, or if there was a pre-existing permanent impairment, that it combined with Claimant's workplace injury to make Claimant materially and substantially more disabled than he would have been based on his workplace accident alone. Accordingly, Employer's application for Section 8(f) relief is denied.

H. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

I. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability benefits pursuant to 33 U.S.C. § 908(b) of the Act, for the period of April 16, 1999 to May 23, 1999, based on an average weekly wage of $784.12, and a corresponding compensation rate of $522.75.

2. Employer shall pay to Claimant permanent total disability pursuant to 33 U.S.C. § 908(a) of the Act for the period of May 24, 1999 to August 13, 2002, based on an average weekly wage of $784.12, and a corresponding compensation rate of $522.75.

3. Employer shall pay to Claimant permanent partial disability benefits pursuant to 33 U.S.C. § 908(c)(21) of the Act, for the period of August 14, 2002 and continuing, based on two thirds the difference between Claimant's pre-injury wage earning capacity of $784.12, and his post-injury weekly wage earning capacity of $225.60, resulting in temporary partial disability compensation in the amount of $372.34 per week.

4. Employer shall be entitled to a credit for all compensation paid to Claimant after April 15, 1999.

5. Employer shall pay Claimant for all properly requested future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

6. Employer's application for Section 8(f) relief is denied.

7. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

8. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge